LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 4 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. McKINNIE, *et al.*,

Petitioners,

—v.—

TENNESSEE,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioners

CHARLES S. RALSTON
of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory and Constitutional Provisions Involved	3
Statement of the Case	5
Summary of Argument	10
ARGUMENT	13
I. The Enactment of the Civil Rights Act of 1964, Subsequent to These Convictions But While They Were Still Under Direct Review, Makes Necessary Either Their Outright Reversal or a Remand to the State Courts for Consideration of That Act	13
A. *The Civil Rights Act of 1964 Abates These Prosecutions As a Matter of Federal Law, and These Cases Should Be Reversed on That Ground*	13
B. *The Least Possible Consequence in This Case, of the Rule Announced in* Bell v. *Maryland Is Its Remand to the State Court, for Consideration There of the Effect of the Enactment of the Federal Civil Rights Act of 1964*	15

PAGE

II. Petitioners' Convictions Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States 17

III. Petitioners' Convictions Deny Due Process of Law Because They Are Based on No Evidence of the Essential Elements of the Crime of Unlawful Conspiracy 19

IV. Petitioners Were Denied Due Process in Violation of the Fourteenth Amendment When the Trial Judge Instructed the Jury That Petitioners Were Charged With Violation of a Statute When (a) Petitioners Had Not in Fact Been Indicted for Violation of the Statute and (b) It Was Not Even a Criminal Statute 24

V. Petitioners Were Denied Due Process in That Their Convictions Were Affirmed on a Ground Not Litigated in the Trial Court 27

VI. Petitioners Were Denied a Fair and Impartially Constituted Jury Contrary to Due Process of Law and Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution 29

CONCLUSION 32

APPENDIX 1a

Civil Rights Act of 1964, Title II 1a

Table of Cases

PAGE

Aldridge v. United States, 283 U. S. 308 ..... 12, 31

Bell v. Maryland, 378 U. S. 226 ..... 10, 14, 15, 16

Cantwell v. Connecticut, 310 U. S. 296 23
Cline v. State, 204 Tenn. 251, 319 S. W. 2d 227 (1958) 20
Cole v. Arkansas, 333 U. S. 196 ..... 12, 20, 26, 27, 29

DeJonge v. Oregon, 299 U. S. 353 26
Delaney v. State, 164 Tenn. 432, 51 S. W. 2d 485 (1932) 20

Garner v. Louisiana, 368 U. S. 157 ..... 11, 21, 22, 23
Glasser v. United States, 315 U. S. 60 31

Hamilton v. Alabama, 368 U. S. 52 27
Hauenstein v. Lynham, 100 U. S. 483 16

Lombard v. Louisiana, 373 U. S. 267 ..... 10, 18

Shelley v. Kraemer, 334 U. S. 1 18
Shuttlesworth v. City of Birmingham, 376 U. S. 339 26
Smith v. Texas, 311 U. S. 128 31
Stromberg v. California, 283 U. S. 359 ..... 12, 25, 27

Terminiello v. Chicago, 337 U. S. 1 ..... 12, 25, 27
Thiel v. Southern Pacific Co., 328 U. S. 217 31
Thompson v. Louisville, 362 U. S. 199 23

United States v. Chambers, 291 U. S. 217 14
United States v. Tynen, 78 U. S. (11 Wall.) 88 14

Winters v. New York, 333 U. S. 507 23

Federal Statutes

PAGE

Civil Rights Act of 1964, Title II, 78 Stat. 241 ..... 3, 10, 13, 14, 15

1 U. S. C. §109, 61 Stat. 635 3

State Statutes

1 Maryland Code §3 (1957) 15

Tenn. Code Ann. §1-301 ..... 5, 16

Tenn. Code Ann. §39-1101(7) 4, 17, 19, 24

Tenn. Code Ann. §62-710 ..... 4, 18, 24, 25, 26, 27

Tenn. Code Ann. §62-711 ..... 5, 17, 19, 24

Other Authority

Brief for Petitioners, Hamm v. City of Rock Hill, No. 2 October Term, 1964 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. McKINNIE, *et al.*,

Petitioners,

—v.—

TENNESSEE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Supreme Court of Tennessee (R. 315) is reported at —— Tenn. ——, 379 S. W. 2d 214, the opinion of the Supreme Court of Tennessee on petition for rehearing (R. 328) is reported at —— Tenn. ——, 379 S. W. 2d 221. The Criminal Court of Davidson County, Tennessee, Division Two, delivered no opinion (R. 314).

Jurisdiction

The final judgment of the Supreme Court of Tennessee, which is the order denying rehearing, was entered on March 5, 1964 (R. 329). The petition for writ of certiorari was filed June 3, 1964, and granted October 12, 1964 (R. 331).

The jurisdiction of this Court is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here denial of rights secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Does the federal Civil Rights Act of 1964 compel the reversal of these convictions, as a matter of federal law?

2. Must these cases be remanded to the state courts for consideration of the effect of the federal Civil Rights Act of 1964?

3. Do these convictions result in the enforcement of racial discrimination against petitioners, with such admixture of "state action" as to bring to bear the equal protection guarantees of the Fourteenth Amendment?

4. Is the record so devoid of any evidence of the essential elements of unlawful conspiracy as to render the conviction for that offense a deprivation of due process of law under the Fourteenth Amendment?

5. Did the action of the trial judge in instructing the jury three times that petitioners were charged with violating a law under which they had not been indicted and which was not even a criminal statute deprive petitioners of due process of law under the Fourteenth Amendment?

6. Did the Supreme Court of Tennessee affirm petitioners' conviction on a ground not litigated in the trial court so as to deny them an appeal which considered the case as it was tried, in violation of the due process clause of the Fourteenth Amendment?

7. Did a trial by an all-white jury, some of whose members admitted personal belief in racial segregation, preclude petitioners having a fair and impartial jury of their peers in violation of due process, and did the trial judge's refusal to dismiss jurors challenged by petitioners for good cause deny petitioners due process of law under the Fourteenth Amendment?

Statutory and Constitutional Provisions Involved

1. This case involves the following provisions of the Constitution:

Article VI, Clause 2;

The Fourteenth Amendment

2. This case also involves the following statutes of the United States:

Civil Rights Act of 1964, Title II, 78 Stat. 243-246, set forth, *infra*, at p. 1a;

1 U. S. C. §109, 61 Stat. 635:

Repeal of statutes as affecting existing liabilities.— The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in

force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

3. This case also involves the following sections of the Code of the State of Tennessee:

39-1101. *"Conspiracy" defined.*—The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . .

62-710. *Right of owners to exclude persons from places of public accommodation.*—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family.

62-711. *Penalty for riotous conduct.*—A right of action is given to any keeper of any hotel, inn, theater, or public house, common carrier, or restaurant against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars ($100), and the offenders shall be liable to a forfeiture of not more than five hundred dollars ($500), and the owner or persons so offended against may sue in his own name for the same.

1-301—The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

Statement

Petitioners, Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, were arrested and convicted of unlawful conspiracy after an attempted "sit-in" demonstration at the Burrus and Webber Cafeteria in Nashville, Tennessee.

Around noon on October 21, 1962, petitioners, young Negro college students, entered the front door of the Burrus and Webber Cafeteria (R. 96).[1] Two swinging doors on the sidewalk opened on the vestibule (R. 89), six feet by six feet, four inches (R. 271).[2] Another set of swinging doors led into the dining room (R. 89).

---

[1] The cafeteria had a front entrance and a back entrance (R. 124).

[2] Estimates of the size of the vestibule varied from four feet by four feet (R. 89) to twelve feet by twelve feet (R. 170), but Otis Williams, the doorman at the Cafeteria, testified that he measured it as six feet by six feet, four inches (R. 270-271).

Before the petitioners could go through the second doors, the doorman, Otis Williams held them closed and said, "Now, we don't serve colored people in here. I want to be nice to you, but we don't serve 'em . . . and you can't come in" (R. 271).[3] Petitioners remained standing in the vestibule for approximately 20 or 25 minutes when they were arrested (R. 92, 278).[4] People were walking in front of the cafeteria, and estimates of the number of people who stood by or near the outside door of the vestibule varied from three or four to seventy-five or one hundred (R. 97, 101, 113, 126, 178-179, 202, 234). It was not established how many, if any, of those standing outside desired to enter the B. & W. or were just curious observers. No witness testified that they were prevented either from entering or leaving the cafeteria (R. 98, 104, 115, 133, 164-166, 179-181, 187, 197-198, 204, 230, 247, 251). The doorman did testify that some customers on the outside left rather than force their way through the crowd (R. 278, 281). However, he also admitted that several did enter the cafeteria (R. 281).

Several patrons of B. & W. testified that if the doorman had not been holding the door so that the petitioners could not enter, there would have been no congestion (R. 100-101, 165, 228-229).[5] Although the doorman and other witnesses

[3] Williams, a 64 year old man weighing only 140 pounds, held the door and kept petitioners out while allowing white patrons in the vestibule to enter the cafeteria, one at a time through a crack in the door (R. 271, 280, 281). He stated he was hired to keep Negro patrons out (R. 281-282) and was ordered to lock the doors if Negroes came (R. 282). When petitioners arrived, Williams "caught the door going into the cafeteria, and stopped them there, and the white people, too . . . " (R. 269).

[4] The doorman testified that petitioners were there forty or forty-five minutes (R. 272). However, he did indicate that in the excitement he was not able to keep accurate track of the time (R. 278).

[5] Charles Edwards stated:

"Q. If the doorman hadn't blocked the door, they would have gone in the place, so that ingress and egress would have

testified that petitioners were "pushing and shoving" in the vestibule (R. 168, 169, 214, 278-280),[6] their evidence indicated that this was occasioned in part by white patrons coming through the crowded vestibule (R. 175-177, 279-280). All the witnesses entered the cafeteria, although a few spoke of having to "elbow" or "push" their way through (R. 116-117, 187). Others entered with little difficulty (R. 109, 164).[7]

One witness testified that as she approached the restaurant she heard someone say, "When we get there, just keep pushing. Do not stop. Just keep on pushing," that she looked around and saw a group of Negroes who passed her

---

been free? Wouldn't it? A. I suppose so, if he had wanted Negroes in, too.

Q. Yes, sir, the doorman was blocking them so that they couldn't get in? A. The doorman was holding the door, and the Negroes were blocking the vestibule so that people couldn't get in there.

Q. . . . The doorman was the one who was blocking the door and keeping people out? . . . A. He was holding the Negroes out, and as a result, they had the vestibule blocked, and the other people could not get by" (R. 100-101).

[6] The evidence of the doorman was the strongest against petitioners. He testified that they pushed white persons up against the wall and doors (R. 271, 280, 289), that they were acting "brutish" (R. 289), and that one tried to force his way in (R. 289-290).

[7] Mrs. Charles Edwards testified that she "just went right in" (R. 109). Mickey Lee Martin testified:

"Q. You had no trouble getting in? A. No, sir.

Q. Did you have to ask them to let you in? A. Sir?

Q. Did you have to ask these colored people to let you in? A. Yes, sir.

Q. And did they let you in? A. Yes, sir, they let me in" (R. 164).

Patrolman Pyburn testified that after petitioners were standing four on either side of the vestibule "a person medium size could get in" (R. 245-246).

on the street and entered the restaurant (R. 210-211, 219-222).[8]

W. W. Carrier, Manager of B. & W., testified that informed of petitioners' presence, he went to the front door (R. 89) and "discovered a large gathering of people . . . on the outside, and eight young Negroes were in the vestibule, in between the two doors" (R. 89). Carrier did not speak to petitioners at that time (R. 91). He called the police and went outside to wait for them (R. 92). He testified:

> Q. As you attempted to pass through the vestibule, what, if anything, occurred? A. Well, actually nothing, sir. The—the young men were standing in position, and it was just a matter of my easing through the crowd (R. 92).

Petitioners informed him that they were seeking service (R. 94), but Carrier refused because they were Negroes[9] (R. 95). At no time did he directly order petitioners to leave.[10] His sole comment was to request that they move back and let a lady get out which petitioners did (R. 93). He admitted that persons were able to get in and out of the cafeteria (R. 91).

---

[8] See also testimony at R. 223, 225.

[9] On cross-examination Carrier stated:

"Q. You have the facilities to serve them? A. We do have.

Q. Was your place of business crowded at the time? A. It was beginning to be crowded, sir.

Q. Now, the only reason that you didn't serve them was because they were Negroes and not white, wasn't it? A. Yes, sir.

Q. And the same boys, seeking service would have been all right if they were white? A. Yes, sir" (R. 95).

[10] Carrier testified he did not swear out warrants against petitioners and had no idea how his name appeared on them as prosecutor (R. 123).

The police arrived shortly after 12:20 and arrested petitioners (R. 126, 129). They were charged under a grand jury presentment [11] (R. 1-5) alleging that they:

> [O]n the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms, in the County aforesaid, unlawfully, willfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 Sixth Avenue North, Nashville, Davidson County, Tennessee (R. 2).

The indictment also alleged that the B. & W. Cafeteria had a policy of not admitting Negroes, that this policy was carried on under rights established by Tennessee law, that there were integrated restaurants in Nashville known to petitioners, and that petitioners wilfully and deliberately conspired to conduct "sit-ins" at various white-only restaurants in furtherance of the integration movement of which they were a part (R. 3-4).

Petitioners were tried together in the County Court of Davidson County, Tennessee. After conviction of unlawful conspiracy (R. 15) they were sentenced to ninety days in jail and fifty dollars fine [12] (R. 16). Appeals were taken to

---

[11] Petitioners were arrested without warrants by Nashville police officers and originally charged with violating City Code Chapter 26, Section 59 (state law regarding sit-ins) (R. 160). Later in the same day, warrants were issued charging them with unlawful conspiracy. The grand jury presentment was made on December 12, 1962 (R. 1).

[12] The jury suggested a fine of less than fifty dollars (R. 313) but the judge later imposed the severer sentence.

the Supreme Court of Tennessee which affirmed the convictions (R. 326) and denied a petition to rehear (R. 329).

Summary of Argument

I.

The Civil Rights Act of 1964, Title II (Public Accommodations), compels the reversal of these cases and their remand for dismissal, both under the doctrine expounded in *Bell* v. *Maryland*, 378 U. S. 226, and by virtue of §203(c) of the Civil Rights Act of 1964, forbidding "punishment" of acts such as those here shown to have been committed. The federal and common-law doctrine of abatement of criminal prosecutions, on removal of the taint of criminality, here applies.

Moreover, it is clear, under the holding in *Bell* v. *Maryland, supra*, that this case must at least be remanded to the state court for consideration of the abating effect of the Civil Rights Act under state law, since that Act is part of the law of every state.

II.

This case involves the use of state power to effect racial discrimination, contrary to the equal protection clause of the Fourteenth Amendment.

In Tennessee at the time of the prosecutions discrimination was expressly permitted under statute. Petitioners, after attempting to seek service in a white-only cafeteria, were prosecuted under a presentment that characterized their integration movement as an unlawful conspiracy. Thus, the State adopted the posture of supporting and enforcing segregationist policies, and, under the rule of *Lombard* v. *Louisiana*, 373 U. S. 267, denied petitioners the

equal protection of the laws in violation of the Fourteenth Amendment.

III.

These convictions deny due process of law in that the record is devoid of evidence of the essential elements of the crime charged, unlawful conspiracy.

Under Tennessee law, it is necessary to prove both an agreement and an overt act in order to convict for conspiracy. All the evidence in this case shows, however, is that petitioners went to a cafeteria to attempt to obtain service, were barred from entrance after they had gone into a small vestibule, and that the resulting congestion made it inconvenient for other patrons to enter.

The lack of evidence that they agreed or intended to obstruct the doorway or to disrupt the cafeteria's business in any way requires that the convictions be reversed, under the rule in *Garner* v. *Louisiana*, 368 U. S. 157.

IV.

Petitioners were denied due process in that the trial judge instructed the jury that they were charged with violating a statute when no such charge was in the indictment, and the statute was civil, not criminal.

The Supreme Court of Tennessee admitted that the trial judge erred in instructing the jury that petitioners were charged with conspiracy to violate a statute that merely removed the old common law duty of innkeepers and others to serve all patrons. The court, however, dismissed the error as insubstantial because there was ample evidence for a conviction on the other charges.

However, this court has held that where a jury renders a general verdict, as was done here, and the instructions were

erroneous, particularly as to the statutes under which the defendants were charged, the convictions must be reversed since it is impossible to tell the effect the error had on the jury's determination. *Terminiello* v. *Chicago,* 337 U. S. 1; *Stromberg* v. *California,* 283 U. S. 359.

V.

Petitioners were denied due process by the Supreme Court of Tennessee affirming their convictions on a theory other than that under which the cases were presented to the jury.

The presentment and the judge's instructions made the right of the cafeteria to discriminate a central issue in this case, so that an aura of illegality was cast over petitioners' attempt to gain equal service. The Tennessee Supreme Court, however, based its decision on the assumption that the question of a right to segregate was not present. This action violated the rule established in *Cole* v. *Arkansas,* 333 U. S. 196, that a defendant is entitled to have his case decided by a state appellate court on the same basis on which it was presented at trial.

VI.

Petitioners were denied a fair and impartial jury contrary to due process of law and equal protection of the laws secured by the Fourteenth Amendment.

The presentment made the right to operate a segregated establishment a central issue in the case. However, the trial judge refused petitioners the right to challenge for cause veniremen who stated that they believed in the right to discriminate. Therefore, the jurymen began prejudiced against the petitioners, in violation of the rule stated in *Aldridge* v. *United States,* 283 U. S. 308.

ARGUMENT

I.

The Enactment of the Civil Rights Act of 1964, Subsequent to These Convictions But While They Were Still Under Direct Review, Makes Necessary Either Their Outright Reversal or a Remand to the State Courts for Consideration of That Act.

A. *The Civil Rights Act of 1964 Abates These Prosecutions as a Matter of Federal Law, and These Cases Should Be Reversed on That Ground.*

The federal Civil Rights Act of 1964, 78 Stat. 241, went into effect on July 2, 1964. The B. & W. Cafeteria comes within the terms of Title II, providing for equal enjoyment of public accommodation, since, being open to the general public (R. 94) it served or offered to serve interstate travelers.[13] Therefore, the petitioners would have had federal statutory protection in seeking service if they had acted after passage of the act.

---

[13] Civil Rights Act of 1964, Title II, Section 201 . . .

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . . (2) Any restaurant, *cafeteria,* lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, ...

* * * * *

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), *it serves or offers to serve interstate travelers* or a substantial portion of the food which it serves . . . has moved in commerce; . . . [Emphasis added].

Moreover, Section 203(c) of the Act provides, "No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." Assuming, for the moment only, that petitioners were prosecuted for attempting to exercise 201 rights, this section clearly would bar the commencement of any prosecution if the incident here had taken place after July 2, 1964. It would also bar prosecutions or existing punishments begun before that date, since the section bars punishment of rights "secured" by the Act. In other words, the Act does not only create new rights, but also protects rights already in existence.

In addition to the wording of section 203(c), these prosecutions also should cease under the Federal rule that a change in the law, prospectively rendering that conduct innocent which was formerly criminal, abates prosecution on charges of having violated the no longer existent law. See *Bell* v. *Maryland*, 378 U. S. 226, 231, n. 2; *United States* v. *Chambers*, 291 U. S. 217; *United States* v. *Tynen*, 78 U. S. (11 Wall.) 88. And under the supremacy clause of the Constitution (Article VI, clause 2), a federal statute has the same abative effect on a state criminal proceeding.[14]

Turning to the application of these principles to the case at hand, it is clear that the character of the presentment is of central importance. If the petitioners had simply been prosecuted for disorderly conduct, it would have been difficult to say that they were being punished for "attempting to exercise" rights secured by section 201. However, in the presentment the state charged that petitioners knew that the B. & W. Cafeteria had a policy of racial segregation (R. 3), and that they "unlawfully, willfully, . . . and in-

[14] These are the same arguments made in more detail for petitioners in *Hamm* v. *City of Rock Hill*, No. 2, October Term, 1964, Brief for petitioners, pp. 18-41.

tentionally" united and conspired to conduct "sit-ins" in order to try to compel the owners to serve them on a non-segregated basis (R. 3-4).

Thus, in the guise of a prosecution for conspiring to obstruct commerce and commit disorderly acts, the state has set out to punish petitioners for attempting to gain rights protected by the 1964 Act.

For these reasons, these prosecutions must be abated as a matter of federal law.

B. *The Least Possible Consequence in This Case, of the Rule Announced in* Bell v. Maryland *Is Its Remand to the State Court, for Consideration There of the Effect of the Enactment of the Federal Civil Rights Act of 1964.*

In *Bell* v. *Maryland*, 378 U. S. 226, decided at the last term of this Court, it was held that the enactment of a state public accommodations law, subsequent to the commission of the alleged offenses but while the convictions were still under review, made appropriate a remand to the state courts, for consideration of the question whether, within the framework of the state common and statutory law, such intervening enactment destroyed the legal basis for prosecution and made dismissal appropriate. This action was taken by this Court after careful consideration both of the general common law rule and of the Maryland general "saving clause," 1 Md. Code §3 (1957), see *Bell* v. *Maryland*, *supra*, 378 U. S. at pp. 230-234, 236, 237.

The federal Civil Rights Act besides being a permanent federal law, is a part of the law of each state.

> It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also Shanks v.

> Dupont, 3 Pet., 242; Foster v. Neilson, 2 Pet., 253; Cherokee Tobacco, 11 Wall., 616; Mr. Pinkney's Speech, 3 Elliot's Const. Deb. 231; People v. Gerke, 5 Cal., 381. (*Hauenstein* v. *Lynham,* 100 U. S. 483, 490.)

For the narrower application of the *Bell* holding the position, therefore, must be taken to be the same as it would be if Tennessee had, while these prosecutions were pending, enacted laws exactly equivalent, in tenor and effect, to the federal Civil Rights Act.

Tennessee has a general "saving clause" statute, Tenn. Code Ann. §1-301:

> The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

The application of this statute to the saving of these prosecutions is even more dubious than that of the Maryland statute, *Bell* v. *Maryland, supra,* for the Tennessee statute speaks only of "repeal," where the Maryland statute speaks of "amendment" as well, see *Bell* v. *Maryland, supra,* 278 U. S. 226 at pp. 234-5, and the operation of a public accommodations statute, forbidding racial discrimination, upon a general trespass law, more nearly resembles "amendment" than "repeal," though (as the Court points out in *Bell*) neither word may be apt.

As to this case, therefore (even on the assumption, which is contrary to fact, see Point I-A *supra,* that the abating effect of the Civil Rights Act is to be taken to be solely a state-law question), the least effect of *Bell* must be reversal and remand for consideration of the question whether the Civil Rights Act, in its section quoted above, has the effect of abating these prosecutions.

II.

Petitioners' Convictions Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

If it could be assumed (as apparently it was by the Supreme Court of Tennessee) that this case involved simply prosecutions for conspiracy to commit an act injurious to commerce under §39-1101 and conspiracy to commit turbulent or riotous conduct under §62-711, then the main question would be the sufficiency of the evidence supporting those charges (See Part III, *infra*). However, by the way it framed the presentment, the State has put itself in the posture of directly enforcing racial discrimination.

The presentment recited at some length that the owners of the B. & W. Cafeteria had a rule that they would serve only white customers, and that this policy was allowed under the provisions of the Tennessee Code (R. 2-3). It charged that petitioners knew of this practice, and deliberately embarked on a program of "sit-ins" for the purpose of forcing owners to integrate their restaurants (R. 3, 4). The participation in this integration movement was characterized as an "unlawful conspiracy," and the disturbance involved in this case was termed "an overt act" (*Ibid.*).

Thus, the emphasis of a case that could have been presented simply as one of a group of persons obstructing a doorway, was shifted radically to one of enforcement of racial discrimination. The jury must have believed that the case involved the maintenance of a segregated establishment, and they must have regarded themselves as the enforcers of the B. & W.'s policies. Moreover, the judge's charge could only have reinforced this belief; he read the presentment and the text of the statute giving the B. & W. the right to discriminate, and told the jury that petitioners

were charged with conspiracy to violate that statute (i.e., to violate the owner's right to run a segregated cafeteria).

Since the State, through its agents, the prosecutor, grand jury, and judge, decided to frame the case as to involve itself in the enforcement of the segregationist policies of the B. & W., it cannot now claim that all that was involved was a simple prosecution for conspiracy to commit disorderly conduct. This case, therefore, is analogous to *Lombard* v. *Louisiana*, 373 U. S. 267, where there was also no ordinance or state law specifically requiring segregation. Sufficient state involvement was found in pronouncements by city officials that "sit-ins" would not be allowed, followed by prosecutions for trespass. Here, there was a statute clearly designed to allow segregation, since it abrogated the long established common law rule that prohibited discrimination in certain businesses. And although there was no action before the arrests, as there was in *Lombard*, the prosecutor and grand jury did act as enforcers of private discrimination by making the maintenance of segregated facilities a main issue in the case. In so doing, the state denied petitioners the equal protection of the laws in violation of the Fourteenth Amendment.

In addition, the convictions here must fall under the rule of *Shelley* v. *Kraemer*, 334 U. S. 1. Tennessee has a statute, §62-710, which is specifically designed to permit racial discrimination. The State, moreover, has used its prosecutor and its courts to actively enforce the permitted custom of segregation. As *Shelley* made clear, such employment of any branch of the state is a violation of the equal protection clause of the Fourteenth Amendment. The action of petitioners was like that of other "sit-in" demonstrators, and the state may not evade the duty imposed by *Shelley* simply by characterizing the prosecution as one for conspiracy to commit a disorderly act or to interfere with commerce.

III.

Petitioners' Convictions Deny Due Process of Law Because They Are Based on No Evidence of the Essential Elements of the Crime of Unlawful Conspiracy.

The presentment under which petitioners were charged alleged that they:

> . . . with force and arms, unlawfully, willfully, knowingly, deliberately, and intentionally, did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade or commerce of Burrus and Webber . . . (R. 2).

In its opinion the Supreme Court of Tennessee stated:

> Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead to a breach of the peace (R. 318).

The court further stated that:

> . . . [C]onspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two or more persons to do something unlawful, either as a means or as an ultimate end (R. 319).

Under Tennessee law, as under that of most jurisdictions, the elements of a conspiracy are an agreement between two or more persons to commit an unlawful act, and the commission of some overt act in furtherance of the plan.[15] In this case there would be two possible unlawful acts that the petitioners agreed to do: first, to seek service at a white-only cafeteria; and second, to obstruct passage into the cafeteria by jamming the vestibule.

Since the Supreme Court of Tennessee acknowledged that an agreement to try to integrate a cafeteria could not be an unlawful conspiracy (R. 322), the State had to produce evidence of an agreement to try to force service by illegal means, *viz.*, the deliberate obstruction of the entrance way.[16] This burden, however, was not met. The only direct evidence of a conspiracy was the testimony of two witnesses that they heard one of the petitioners say, as the group approached the B. & W., that when they got there or when they started in, they should keep going, keep pushing, and not stop (R. 210-211, 219-222, 223, 225).

Even assuming that the other members of the group agreed to this course of action, the statement is still no evidence of a conspiracy to obstruct or interfere with the cafeteria entrance. The statement can only mean that petitioners had decided to enter the cafeteria even though some attempt might be made, whether by the management

---

[15] For construction of the Tennessee conspiracy statute see: *Delaney* v. *State*, 164 Tenn. 432, 51 S. W. 2d 485 (1932) (Persons must unite and agree to pursue an unlawful enterprise); *Cline* v. *State*, 204 Tenn. 251, 319 S. W. 2d 227 (1958) (gist of conspiracy is agreement to effect unlawful end, but, before offense is complete, party to conspiracy must commit some "overt act").

[16] The mere showing that a disorder took place, or even that petitioners might have been guilty of disorderly conduct would not be enough, since conspiracy was charged. *Cole* v. *Arkansas*, 333 U. S. 196.

or white customers, to deter them. In other words, the statements show a resolution to seek service and use the cafeteria facilities, and give no support to any intention to obstruct their use by any other customers.

Under Tennessee law conspiracy may also be inferred by circumstantial evidence; however, for such an inference to be drawn, the standard of sufficiency of evidence applicable in *Garner* v. *Louisiana*, 368 U. S. 157, must be met. The testimony s rial here does not support the conclusion that petitioners had agreed to obstruct the entrance or do any other disorderly act.

In the first place, the doorway was not in fact blocked to the extent that no one could enter; witnesses testified either that they were able to make their own way through the crowd (R. 91, 92, 109, 245-246, 251), or that petitioners stepped aside when asked (R. 93, 164). Indeed, the evidence is clear that what actually caused obstruction and crowding in the vestibule was the fact that the doorman would not let the petitioners in; the testimony of a number of witnesses showed that if he had opened the door there would have been no difficulty (R. 100-101, 165, 228-229, 281).

Morover, no witness testified that petitioners committed any disorderly act or acts which constituted a breach of the peace, or that violence occurred or was even threatened. They used no bad language (R. 226) and did not force themselves past the doorman who held the door, something they could easily have done, considering his size and weight (R. 276). Petitioners were not "ugly" or "disrespectful" but were, as one witness testified, "just there" (R. 108-109). Although they were told "we don't serve colored people in here" and "you can't come in," no one asked them to leave the vestibule, where they remained until they were arrested.

Two witnesses testified that petitioners were "pushing" and "shoving" (R. 168, 214). However, it was not established whether this pushing and shoving resulted from the natural congestion in the vestibule caused by the doorman's blocking the door or by petitioners' actions alone. Moreover, a few white patrons stated that they "pushed" inside the vestibule. One man testified that he "kind a pushed" his way in (R. 136) and another testified that he "push[ed] my way through with my boy . . . I did a little pushing" (R. 187).

Not only, therefore, was there no evidence that petitioners conspired to commit an unlawful act, the record solidly refutes the Supreme Court of Tennessee's conclusion that the means employed were unlawful.

This case is not materially different from the ordinary "sit-in" cases, where Negroes have been convicted for trespass after remaining at lunch counters when requested to leave by restaurant owners, solely because of race. No constitutional difference exists between sitting quietly on a lunch stool and standing quietly in a vestibule to protest racial discriminaton. This court has found no problem in reversing "sit-in" convictions based on no more evidence than the Negroes' "mere presence" at white restaurants. *Garner* v. *Louisiana*, 368 U. S. 157. Here as in *Garner*, the petitioners were not ordered to leave by the restaurateur or his employees.

It has been recognized that a Negro sitting at a lunch counter in a southern state to protest racial segregation is engaged in a type of expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana, supra* (Mr. Justice Harlan, concurring). If, therefore, petitioners' conduct is construed to constitute an unlawful conspiracy, then the statute under which they were charged and convicted is unconstitutionally vague in that it failed to warn

petitioners that it was unlawful to quietly remain in a cafeteria vestibule and because, if so construed, it limits petitioners' right of free expression. *Garner* v. *Louisiana, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Winters* v. *New York,* 333 U. S. 507, 509.

In summation then, the evidence shows only that: petitioners agreed to go to the B. & W. Cafeteria to attempt to secure non-segregated service there; when they arrived their entrance was blocked by the doorman (there was no evidence that they should have expected this to happen); during the time they were trying to get in the resulting congestion made it inconvenient for white patrons to enter or leave, although none was prevented from doing so; this situation existed for only a brief time, 20 or 25 minutes, until the police arrived; petitioners co-operated fully with the officers, both in standing on both sides of the vestibule and in leaving. The record is totally devoid of any evidence indicating that they either had agreed to obstruct the doorway beforehand or even that they wanted or tried to after they arrived.

Because there is no evidence to support the charges of unlawful conspiracy, the convictions deny petitioners due process of law. *Thompson* v. *Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157.

IV.

Petitioners Were Denied Due Process in Violation of the Fourteenth Amendment When the Trial Judge Instructed the Jury That Petitioners Were Charged With Violation of a Statute When (a) Petitioners Had Not in Fact Been Indicted for Violation of the Statute and (b) It Was Not Even a Criminal Statute.

Petitioners were indicted for unlawfully conspiring to violate Sections 39-1101(7) (act injurious to commerce) and 62-711 (riotous conduct) of the Code of Tennessee. After reading the presentment to the jury, the judge read them the texts of not only the two above sections but also that of Section 62-710 (R. 298). This section abrogates the rule of the common law imposing a duty on innkeepers, etc., to serve all persons, and allows them to exclude anyone for any reason. He then, on three occasions, told the jury that petitioners were charged with conspiracy to violate not only Sections 39-1101(7) and 62-711, but also Section 62-710.[17]

---

[17] The trial judge told the jury (R. 299):

> You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101(7), Code Sections 62-710 and 62-711, in that they did unlawfully commit acts injurious to the restaurant business, trade and commerce of Burrus & Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

And also at (R. 302-303) he said:

> . . . If you find and believe beyond a reasonable doubt that the said defendants unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Tennessee Code Section 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, as

Petitioners' motion for a new trial, urging this as a denial of due process, was overruled (R. 18-19, 27).

It is clear that §62-710 itself could not form the basis for a criminal charge of any sort. It merely changes a rule of the common law and is not a penal statute. Moreover, the state could not punish someone for conspiring to violate the section, since the section imposes no duties. It merely says that innkeepers may refuse to serve, if they choose; it says nothing about other persons seeking service, even from a reluctant owner. Indeed, the Supreme Court of Tennessee acknowledged that the statute was civil and the judge's charge was error (R. 321).

The instruction to the jury that they could convict petitioners on a charge not capable of being made, clearly violated petitioners' right to due process of law. In *Stromberg* v. *California*, 283 U. S. 359, a conviction based on a general verdict under a state statute was set aside because one part of a statute submitted to the jury was unconstitutional. In *Terminiello* v. *Chicago*, 337 U. S. 1, the court in instructing the jury about a city ordinance did so on a theory which permitted conviction on an unconstitutional basis.

In addition, even if §62-710 might form the basis of a criminal charge, it could not be used in this case since the presentment was not brought under it.[18] It is clear that a

---

charged in the presentment, then it would be your duty to convict the defendants; provided, that they, or one of them, did, in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement; that is, if you find that said agreements and acts in the furtherance of said objective were done in Davidson County, Tennessee.

See also, R. 305.

[18] The presentment mentions §62-710 but the petitioners were specifically charged under §§39-1101(7) and 62-711 (R. 2). As will be discussed *infra*, however, the presentment does add to the confusion resulting from the judge's charges.

defendant may not be convicted for one offense after having been indicted for another. *DeJonge* v. *Oregon*, 299 U. S. 353. Cf., *Cole* v. *Arkansas*, 333 U. S. 196; *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339.

The Supreme Court of Tennessee rejected these arguments, saying that the charge, even though error, could not have been harmful since there was ample evidence to convict the defendants of the offenses defined in the other code sections (R. 321). However, this conclusion overlooked the nature of the case and the presentment involved. The jury's verdict was a general one, viz., "guilty of unlawful conspiracy" (R. 15). It is impossible from this to ascertain what the jury believed petitioners were guilty of conspiring to do. The presentment itself referred to §62-710 and described at some length the practices of the B. & W. Cafeteria in excluding Negroes; it also stated that the owners of the B. & W. had the right to discriminate under Tennessee law (R. 3). The presentment recited that the petitioners were engaged in "a movement to coerce, compel, and to intimidate owners of restaurants . . . and cafeterias serving only white persons to 'integrate'" against the policy established by virtue of §62-710 (R. 3, 4).

Thus, from the presentment alone the jury could have been confused and under the impression that petitioners, by the mere act of attempting to integrate against the wishes of the B. & W., were committing an unlawful act. Such an impression could only have been affirmed by the judge's instruction, which specifically stated that petitioners were charged with conspiring to violate the section giving the B. & W. the right to discriminate. Since the jury's verdict does not indicate what in fact was the basis for its decision, the possible prejudicial effect of the judge's charge cannot be ignored. *Stromberg* v. *California*, 283 U. S. 359; *Termi-*

niello v. *Chicago*, 337 U. S. 4. Cf., *Hamilton* v. *Alabama*, 368 U. S. 52; *Cole* v. *Arkansas*, 333 U. S. 196.

The State Supreme Court's statement that "there were no questions raised following the charge about the propriety of reading it [§62-710]" misses the mark on several counts. First, the petitioners sought and were refused an instruction, contrary to the one given, to the effect that notwithstanding §62-710, the restaurant had no right to exclude them (R. 310). Secondly, they did object, by motion for new trial, to the reading of this statute (R. 18-19). Thirdly, they also objected, on due process grounds, to the trial judge's misstatement of the offense charged in the motion for new trial (R. 19). Finally the stated ground of decision below was "harmless error" and not any theory that the objection was not timely. In any event there were no objections made to the instructions given in *Stromberg supra*, and *Terminiello, supra*.

V.

Petitioners Were Denied Due Process in That Their Convictions Were Affirmed on a Ground Not Litigated in the Trial Court.

The petitioners were tried and convicted under a grand jury presentment which was drawn on the theory that the B. & W. Cafeteria was legally entitled under Tennessee law (§62-710) to exclude petitioners because of their race (R. 2-3). The trial judge read the presentment and also §62-710 to the jury (R. 292-295; 298), and refused a requested instruction that the cafeteria had no legal right to exclude persons because of race (R. 310). Moreover, because the judge instructed the jury that petitioners were charged with conspiracy to violate §62-710 (*i.e.*, to violate the cafeteria's right to discriminate), the jury must have considered that a right to segregate was a central issue.

However, the Tennessee Supreme Court decided the case on the assumption "for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due process and equal protection clauses" (R. 318-319). The court asserted that the only question, given this assumption, was whether the method that petitioners adopted was illegal (R. 319). The Supreme Court of Tennessee disposed of the claimed trial error in refusing an instruction that the cafeteria had no legal right to refuse service on the basis of race by saying (R. 322):

> As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway.

However, the case was submitted to the jury on the theory that the petitioners had lawfully been excluded from the B. & W. Cafeteria because of their race. Thus, the affirmance of the conviction was on a theory that did not take into account the issue that was inextricably bound into the presentment and the charge to the jury.

It is obvious that the jury might have found the petitioners not guilty if it had been instructed that the B. & W. Cafeteria had no legal right to exclude petitioners because of race, and that it violated their rights when it did so. Moreover, the jury was not instructed to consider the issue which the State Supreme Court did decide, *i.e.*, assuming petitioners had a right to enter the cafeteria, was their method of seeking to vindicate that right unlawful.

Since the basis for affirming the convictions was not the same as that under which the convictions were rendered,

the decision of the Tennessee Supreme Court must be reversed under the holding of *Cole* v. *Arkansas,* 333 U. S. 196, 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

VI.

Petitioners Were Denied a Fair and Impartially Constituted Jury Contrary to Due Process of Law and Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

Almost without exception, the white veniremen, including some of the twelve persons who tried and convicted petitioners, upon extensive examination by petitioners' counsel during *voir dire,* admitted a firm and life-long practice, custom, philosophy and belief in racial segregation (R. 32-39, 44-46). Most of the veniremen expressed belief that a restaurant owner had a right to exclude anybody, including Negroes, from his place of business.

Despite this fact, the trial judge in a number of instances overruled petitioners' chailenges for good cause and held certain white jurors competent (R. 38, 46, 68, 80, 85-86). For instance, Herbert Amic was held competent by the trial court over petitioners' challenge after testifying:

> Q. But you think that a business open to the public should be allowed to exclude Negroes? A. If they so desire, yes.
>
> Q. A restaurant business, then specifically,—in particular? And having that opinion wherein the indictment in this case charges that the B. & W. Cafeteria

had had such a rule, and that these defendants went there and sought service, knowing that the B. & W. had such a rule and then you would start out with a prejudiced attitude toward these defendants? A. Well, I would—

Q. By reason of your belief? A. I would believe the B. & W. would be right in this case on their position.

Q. And you would start—what I am saying, though, is you would start out in this case with a prejudiced attitude toward the defendants, wouldn't you? A. In this particular case, I imagine I would (R. 56-57).[19]

Similarly, the trial court held competent other jurors, over petitioners' objections for cause, who testified that their entire lives and all their personal associations had been on a segregated basis without any contact with Negroes on a basis of equality (R. 78-80, 84-85).

In the case at bar, where the very issue to be tried was the right of a restaurateur to exclude persons on the basis of race, the trial judge's failure to exclude these jurors with admittedly preconceived notions against Negroes and in favor of B. & W.'s practice of racial segregation, was highly prejudicial and denied petitioners' right to trial by a fair and impartial jury.

This Court has repeatedly recognized that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the

[19] Mr. Amic did testify later that he was not prejudiced against Negroes as such (R. 61), and that he could render a fair and impartial verdict (R. 61-62). However, the real question is not whether he was prejudiced against Negroes, but whether his opinion on an element in the case made crucial by the way the presentment was framed would make a fully impartial judgment unlikely.

community." *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220; *Smith* v. *Texas*, 311 U. S. 128, 130; *Glasser* v. *United States*, 315 U. S. 60, 85. This Court has also recognized that racial prejudice is a valid ground for disqualification of a juror; in *Aldridge* v. *United States*, 283 U. S. 308, it was said:

> . . . [T]he question is not as to the civil privileges of the Negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment . . . one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit (283 U. S. at 314).

It is clear that the jurors described above and declared competent by the trial court were incapable, by virtue of their segregationist beliefs, to render petitioners a fair and impartial verdict and that their presence as jurors prejudiced petitioners' right to an unbiased trial. Such action denied due process as well as equal protection of the laws. The test established in *Aldridge, supra,* is more than met here.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

JACK GREENBERG
CONSTANCE BAKER MOTLEY
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioners

CHARLES S. RALSTON
of Counsel

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Equal access.

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

Lodgings.

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

Restaurants, etc.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

Theaters, stadiums, etc.

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

Other covered establishments.

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce criteria.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

"Commerce."

Support by State action.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available

to the customers or patrons of an establishment within the scope of subsection (b).

Entitlement.

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Interference.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Restraining orders, etc.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

Attorneys' fees.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Notification of State.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

Community Relations Service.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Hearings and investigations.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary.

The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Suits by Attorney General.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending.

Designation of judges.

Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

Appeals.

An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

District courts, jurisdiction.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

rcement.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.